



## PREVENTING 'UNFAIR END-USER JUSTIFICATIONS' ON 'MEET OR EXCEED' OR ON 'BRAND-NAME OR EQUAL' PUBLIC SOLICITATIONS

### THE RULES AND REGULATIONS

*The Office of Federal Procurement Policy (OFPP) - in consultation with such groups as the National Institute of Government Procurement (NIGP) – and in response to a proven endemic unethical/unfair practices - has issued four separate directives<sup>1</sup> to the procurement community, since 2006, demanding 'vendor neutral' specifications in **all** government solicitations – regardless of the procurement vehicle - to encourage competition and prevent the 'wiring' of commodities to preferred suppliers or manufacturers. Federal Acquisition Regulations (FAR) 11.104; 11.105 and 11.107, according to OFPP, prohibit end-users from requesting a 'sole source/brand'; relying on a patent(s) and/or on **any** unique characteristic(s) to unfairly (and unethically) overly restrict the specifications and/or justify disqualifying of an 'equal(s)' which meets the salient<sup>2</sup> and functional<sup>3</sup> characteristics of the sought after commodity. To stop the reported abusive practice, OFPP has made it clear that **commodities in solicitations which fall in the category of 'non-essential to the business of the government' cannot be supported by an end-user justification.** 'Equals' must be judged, solely, on 'salient and functional characteristics besides its price, for award recommendation purposes. Additionally, a 'brand-name or equal' or a 'meet or exceed' solicitation must also define the basis for the award or, in this absence, **the award must be made, solely, on 'lowest cost.'** Furthermore, all end-user requests for a 'sole-brand/source' must now be supported by a written request, which must be approved by the Procurement Director and it must now be referenced on the solicitation. End users now must also warrant that their procurement requests do not contain patents or unique characteristics. In the case of a dispute/protest, end-user documentation and justifications can be challenged as 'frivolous and capricious.' Although these statements pertain to Federal procurements, its meaning - by default - apply also to ALL public procurements at the state and municipal level where this contracting practice also flourishes at the expense of small, minority and socio-economic businesses affected by the abuse. The FPA intention, in providing this 'notice,' is solely **TO ALERT** procurement specialists of the widely reported endemic procurement practice of wiring procurements to a preferred supplier or manufacturer. Procurement specialists are urged to, consult with their Agency's Procurement Director or Ombudsman; their small business specialist, the SBA PCR assigned to their Agency and/or their Agency's OSDBU office. Such consultation(s) will assure fair competition and ethical evaluations.*

<sup>1</sup> [http://www.whitehouse.gov/omb/procurement/memo/2008\\_brand\\_name.pdf](http://www.whitehouse.gov/omb/procurement/memo/2008_brand_name.pdf)  
[http://www.whitehouse.gov/omb/procurement/memo/fdcc\\_competition.pdf](http://www.whitehouse.gov/omb/procurement/memo/fdcc_competition.pdf)  
[http://www.whitehouse.gov/omb/procurement/memo/2006\\_brand\\_name.pdf](http://www.whitehouse.gov/omb/procurement/memo/2006_brand_name.pdf)  
[http://www.whitehouse.gov/omb/procurement/brandname\\_specs.pdf](http://www.whitehouse.gov/omb/procurement/brandname_specs.pdf)

<sup>2</sup> **salient** \SAY-lee-unt; SAYL-yunt\, adjective: meaning 'prominent and noticeable' [not unique](#)

<sup>3</sup> **functional** \SAY-fungkshan'\, adjective: meaning 'practical and useful' [not exact](#)

## INDUSTRY STANDARDS

**All references to a 'brand name' or to specifications requested by the end-user for 'meeting or exceeding' the requirements on a public solicitation carries responsibilities which are ultimately accountable to the taxpayers. Such a requirement - with or without its respective specifications – by default shall be intended to be descriptive, but not restrictive and shall indicate solely the salient and/or functional characteristics of the commodity that shall be determined satisfactory to the 'end-user' regardless of personal choice. Bids offering an "EQUAL" in both 'brand-name or equal' or on 'meet or exceed' solicitations shall be considered responsive and suitable for a public award if such commodity along with its specifications is identified on the bid as meeting the salient or functional characteristics of the brand, model or the specifications referenced. According to the Federal Acquisition Regulations (FAR) and to the standards of professional procurement organizations such as the National Institute of Government Procurement (NIGP), patents or unique features to a brand cannot be used as qualifying elements for an award. On 'meet or exceed', the functional characteristics of the commodity listed by name or by its specifications need not be exact. Bidders offering an "equal" are required, as part of their bid, to furnish all descriptive material necessary to support their claim that the commodity offered meets the salient and/or functional characteristics of the brand or references cited. To prevent misunderstandings, bidders are encouraged – but not required - to point out to the procurement staff - any 'patent(s) or unique features listed so these are not relied on as 'qualifying factors' for an award, or used to disqualify an offer in spite of what the 'end-user' might have specified or have claimed. Specifications, descriptive literature and/or a website reference for the item(s) offered on the bid might be included and/or referenced to prevent misunderstandings or cause the bid to be declared non-responsive. End users are, nevertheless, responsible for alerting the procurement community of any 'unique' or 'patented' features in commodities they wish to purchase.**



### Fairness in Procurement Alliance (FPA)

<http://www.FPAportal.org>

FPA.Advisorv@GMail.com

## NOTICE

The SBA OIG and the Project on Government Oversight (POGO) have both agreed to investigate the unfair end-user justification practice. Government contractors, advocates and public servants are encouraged to report solicitations and/or awards allegedly affected by this unfair practice.

## HANDLING ALLEGED VIOLATIONS

Contracting Offices receiving an alleged overly restricted purchase request are urged to consult with their superiors and consider removing such copy from the solicitation. Small businesses encountering solicitations which appear to be overly-restrictive or suspect of containing non-functional or non-salient descriptions and thus discriminate against 'equals', shall so advise the Contracting Office before the solicitation due date with a copy to the SBA Procurement Center Representatives (PCRs) with jurisdiction over the Agency. For a complete listing of the PCRs who could help with these cases, visit this SBA link, [http://www.sba.gov/aboutsba/sbaprograms/gc/contacts/gc\\_pcrd1.html](http://www.sba.gov/aboutsba/sbaprograms/gc/contacts/gc_pcrd1.html) When the CO is notified with adequate information and with PCR support, those non-functional or salient characteristics or unique brand-name descriptions may not be used for justification purposes even if the requirement is not revised. FPA is in the process of recommending an alternative dispute resolution vehicle (ADR) which would address, among other things, such disputes. FPA will keep both the Contracting Community and the small business community informed of its progress.